

British Imperial Constitutional Law and the Zionist Campaign against the Legislative Council in Mandatory Palestine

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ABSTRACT

This article examines the role of British imperial constitutional law in the Zionist campaign against establishing a Legislative Council in Palestine during the early 1930s. At the time, the British government sought to introduce limited self-government in Palestine through a parliamentary institution that would include both locals and British officials. However, the Zionist leadership opposed this initiative, fearing that a representative institution reflecting the country's demographics would threaten the development of the Jewish National Home. This article explores the Zionist engagement with the British imperial constitutional experience within its campaign against the Legislative Council, emphasizing the strategic application of British constitutional law by two Zionist officials, Leo Kohn and Chaim Arlosoroff. Through this case, the article highlights the influence of British constitutional law on interactions between national movements and the British Empire. It argues that the British imperial system offered an adaptable and flexible political framework. The Zionists' attentiveness to this flexibility not only sheds light on the interplay between Zionism and the British Empire during the mandatory period but also underscores the place of constitutional flexibility in political debates within the British Empire.

Keywords :

constitutional, the Zionist campaign, introduce, Palestine, leadership, representative

1.Introduction

“What is the British race?” asked Robert Waley Cohen, the prominent AngloJewish oil industrialist and president of the Economic Board for Palestine, at a meeting of the Anglo-Palestinian Club in London in November 1932. He hurried to declare that what was a “mixture of most of the world’s stocks” was not a race at all: “it is a unique solid and political tradition which has made the British

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Empire what it is.” He invited his fellow Anglo-Jews to consider “what it means to us all that Palestine should be a part of the British Empire, entitled to her share in the heritage that belongs to every member of the great commonwealth of nations.” “When the Jew has acquired the sense of that tradition,” Waley Cohen envisioned, “[:::] he will be working with the Government officials, using their knowledge of British systems of government to make the best of the country.”

Waley Cohen was not alone in considering the relevance of British government systems for Palestine. The late 1920s and 1930s saw a substantial interest among Jewish lawyers in British imperial constitutional law. In 1934, Ephraim Salant, a Jewish lawyer from Palestine and a graduate of the University of London, published an introduction to the constitutional law of the British Empire. A few years earlier, Shmuel Ussishkin, a Jerusalem-based lawyer and a graduate of the University of Cambridge, wrote an introduction for the Hebrew reader to English constitutional law. He perceived this introduction as “timely,” “considering the close connections which have emerged in our time between Eretz Israel and the Hebrew people on the one hand and the British Empire on the other.” These connections have “significantly increased the need to know this country,” namely, Britain, “its constitution and institutions, which are a beacon for the whole world.” In the Zionist weekly Haolam, it was contended that “in constitutional scholarship, the English constitution is considered the most important, for it is the mother of all constitutions, their foundation stone.” In his next book, published in 1937 and dedicated to the British Empire’s methods of government, Ussishkin stressed the empire’s importance for Palestine: “While technically Eretz Israel is not a part of the Empire [being a Mandate], the fates of the two are strongly connected.”

But Waley Cohen’s above-cited words reflected not only an academic debate but also a political one. The timing of his speech was not accidental: That month, the High Commissioner of Palestine, Arthur Grenfell Wauchope, reiterated in a meeting of the Permanent Mandates Commission in Geneva his government’s intention to establish a Legislative Council in Palestine: that is, a parliament of limited powers including both British and local

representatives. This initiative was met with increasing Zionist discontent. If the Jews in Palestine were wise enough to learn from their British mentors, Waley Cohen hinted, they would not object so vehemently to the establishment of a

Legislative Council. Ironically, it transpired that Zionist familiarity with British imperial political systems had not paved the way for a growing acceptance of the Legislative Council plan, as Waley Cohen had hoped. On the contrary, it informed a maneuver in the campaign against the prospective council.

The history of British attempts to establish a Legislative Council in Palestine – and Palestinian Arab and Jewish attitudes regarding these attempts – has been documented and discussed in several research works. This article focuses on an aspect of the campaign that has not received scholarly attention yet: the attempt of the Zionist leadership to thwart the establishment of the council by pointing out the malfunctioning of similar parliamentary institutions established across the empire and by targeting British imperial sensibilities.

I here use the term “sensibilities” as defined in Martti Koskenniemi’s work on international law. According to him, the term encompasses “both ideas and practices but also involves broader aspects of the political faith, image of self and society, as well as the structural constraints within which international law professionals live and work.” I argue that this term also applies to other kinds of professionals, such as colonial officials and administrators, whose sensibilities were forged out of their ideas and understandings of the empire and from experience – both personal and collective – in the imperial dependencies.

As this article shows, the Jewish Agency targeted precisely these sensibilities in order to frustrate the establishment of a Legislative Council in Palestine. It mobilized the help of the Zionist official and constitutional scholar Leo Kohn, today known primarily for his drafts of the Israeli constitution that were eventually abandoned. Through his use of imperial constitutional law within the campaign against the Legislative Council, Kohn is revealed to have been highly sensitive to the meaning and implications of Palestine’s relationship to the British Empire, especially in comparison to other imperial contexts. I argue that he displayed what Arie M. Dubnov called an “imperial epistemology”: “a meta-level of political thinking and imagination, anchored in an imperial reality,” which allowed both colonial administrators and subjects “to think of precedents and models, to identify similarities between different, seemingly separate corners of the imperial world.”

I will suggest that Kohn’s work and his imperial epistemology affords two conclusions. First, it allows a glimpse into the Zionist perception of Palestine’s place in the British Empire at the time. Palestine was, to quote Ussishkin, technically “not a part of the Empire.” As a mandatory territory, it was subject to the oversight of the League of Nations. In theory, this separated Palestine from other British dependencies. In praxis, Palestine’s relationship to the British Empire was ambiguous, and the territory was ruled much like any other colony. Moreover, the relationship of the mandatory system with colonialism was itself fraught with ambivalence: Although it sought to distance itself from colonialism, this system also reproduced colonial patterns and safeguarded imperial strategical interests. In other words, the fact that Palestine

was a mandatory territory did not entirely separate it from the British imperial sphere. In the eyes of the Zionist leadership, the boundaries between the mandatory framework and the imperial one were therefore porous. The imperial epistemology of Zionists such as Leo Kohn thus reveals how Palestine's relationship to the British Empire was perceived at the time.

Second, the Zionist engagement with the British imperial constitutional experience during its campaign against the Legislative Council can be analyzed more broadly as a case study for the role of British constitutional law in the context of the relationship between national movements and the British Empire. The first half of the twentieth century saw intensive constitutional activity in many British dependencies, resulting in profound changes in their status within the empire. Constitutional law embodied not only the legal form of these changes, but also the language used to debate participation in the British Empire. In the words of historian John Darwin, it was "the rules of the political game." This was reflected in the academic domain, too: The empire was present in discussions on constitutional law in Britain, and contemporary scholars increasingly understood the Empire as a constitutional project. This article will use the Zionist mobilization of the imperial experience in order to sketch how British constitutional law was perceived by those subjected to British rule. It will moreover use this Zionist mobilization to explore British constitutional law beyond the textual domain, as a lived legal terrain which was negotiated, debated, and harnessed for political purposes.

Kohn was not the only Zionist writer drawing on British imperial constitutional law within the debate on the Legislative Council. As will be discussed, the Labor Zionism leader Chaim Arlosoroff in this matter preceded Kohn by a few years in an internal memorandum written for the Zionist Executive in the late 1920s. And in 1936, the Jewish lawyer John Machover, who was active in Revisionist Zionist circles in London, published a book titled *Governing Palestine: The Case against a Parliament*. Machover dedicated three chapters to "Precedents and Parallels" from the British Empire, including in East and Central Africa, Iraq, Transjordan, Cyprus, and Ceylon. An indictment of the attempts to establish a Legislative Council also formed the focal point of another book published around the same period, this time in Hebrew, by the Jewish constitutional scholar Max Laserson. Laserson, a lecturer at the Tel Aviv School for Law and Economics, which he had helped found, marshalled international law and examples from various legal systems against the attempt to establish a Legislative Council, drawing on British constitutional law and experiences in the British colonies.

This article will focus mostly on Kohn's work, and to a lesser extent Arlosoroff's, and compare this to a limited extent with Laserson's and Machover's publications. This is mainly because unlike Laserson and Machover, who acted as private individuals, Kohn's and Arlosoroff's writings made British constitutional law part of the official Zionist campaign.

The article opens by briefly presenting the British attempt to establish a Legislative Council in Palestine in the 1920s and early 1930s. It then discusses Kohn's first memorandum on the topic, which he authored in 1930. I argue that Kohn sought to supply the Zionist Executive with instructive knowledge on other political solutions devised in the British Empire, so they could be used in establishing a Palestinian parliament. He thereby followed in the footsteps of Arlosoroff, who made similar proposals in the late 1920s. In the third section, I examine

Kohn's later work on the Legislative Council, which drew on arguments from the imperial experience. The fourth and final section analyzes Kohn's and Arlosoroff's dual approach to Palestine's position in the British Empire, comparing it with Laserson's and Machover's. The article concludes by discussing the interplay between imperial constitutional traditions and Zionist considerations, while focusing on the role of constitutional flexibility therein.

A Legislative Council

The attempts to establish a Legislative Council in Palestine can be traced back to the text of the Mandate, which was approved on July 24, 1922. Article 2 imposed on Britain the obligation to develop self-governing institutions in Palestine, an obligation that was incorporated into other mandates granted by the League of Nations, albeit with different wording. The relationship of this obligation to the two other, more famous parts of Article 2 – concerning the establishment of the Jewish National Home and the rights of Palestine's inhabitants – would be hotly debated in the years to come: Should self-governing institutions be established only to the extent that they promoted the Zionist project or were they an expression of the political rights of all Palestinians, the vast majority of whom were Arabs?

The first attempt by the British administration to establish a Legislative Council failed spectacularly, with many Palestinian Arabs boycotting the elections in the winter of 1923. The Palestinian Arab leadership instead championed the creation of an elected representative government, which would be assisted rather than staffed by British advisors.²³ This demand was connected to the categorical Arab rejection of British policy, which was based on the Balfour Declaration and Mandate and prioritized Zionist interests in Palestine. Consequently, they opposed the establishment of a parliament with ten British officials, who, with the help of two Jewish representatives, would be able to force legislation over the heads of the ten Christian and Muslim representatives. This did not mean that Yishuv leaders were keen to see the establishment of a Legislative Council. However, the Zionist leadership headed by Chaim Weizmann resolved to comply with the British plan. Later, the Zionist leader Chaim Arlosoroff would say that this agreement had been “wrung from our hands, against our will, and against our political protests. Unless the Arab extremists had saved us [by boycotting the elections], we should have been compelled to submit.”

With Palestine's largest demographic boycotting the elections, the British administration shelved the plan. But the idea of a Legislative Council gained momentum again in the late 1920s, and the riots that broke out in Palestine in August 1929 were explained, *inter alia*, in terms of Britain's failure to establish representative institutions by then. This development resulted in the Passfield White Paper of October 1930 announcing that “the time ha[d] arrived” to introduce limited self-government in Palestine. Now, however, the tables had turned: The Palestinian Arab leadership was increasingly willing to accept a council with limited legislative powers, while the Zionist and Yishuv leaderships sought ways to rescind their consent given in 1922/23. The next few years, especially from 1932, would see the Zionist position move from ambivalent to uncompromising.

The Zionist rejection of the Legislative Council was inherently linked to its prospective composition and the perceived repercussions for the Jewish National Home. The plan was that the non-British section would roughly reflect the contemporary demographics of Palestine, in which Jews constituted a minority. The 1931 census registered 174,000 Jews in Palestine – a little under seventeen percent of the total population – which paled in comparison to 759,000 Muslims, who amounted to over seventy-three percent, the remainder comprising 91,000 Christians. The Zionist leadership was positive that a Legislative Council dominated by an Arab majority would thwart the development of the Jewish National Home, which was dependent on continuous waves of immigration and land purchases. Moreover, in the words of Arlosoroff, such a council would “accentuate our relative minority” status and “give the Arabs a claim to speak as the representative section of the country.” From the Zionist perspective, it would also provide the divided Arab leadership with a platform to unite and coordinate their policy.

Nevertheless, these political considerations were met with considerable diplomatic obstacles. First, the obligation to establish self-governing institutions was enshrined in the Mandate, whose status the Zionist Organization otherwise tried to magnify, not belittle, due to the responsibility it had imposed on Britain concerning the development of the Jewish National Home. It was difficult to question the validity of one part of Article 2 without opening another to attack. Second, in rejecting the introduction of self-government, the Zionist Organization was risking the image it had promoted of Zionism as the bearer of progress in the Levant.

The Zionist leadership translated these considerations into numerous strategies. Lewis B. Namier, the renowned historian of British politics and Weizmann’s close advisor, suggested as a counterproposal to convene a roundtable for Zionist-Arab understanding, which would satisfy the British administration. Another tactic was to secure British agreement to a plan for the council so unfavorable to the Palestinian Arabs that they would be forced to reject it. Naturally, this refusal would play into the Zionists’ hands, as the council would not come into being and the Arabs would take the blame, as had happened in 1923. However, the most fundamental strategy was probably the conscious Zionist effort to “buy time” and postpone the establishment of the council to the latest date possible, and hope that in the meantime something might happen to take the issue off the agenda. When the initiative was finally discussed in the British parliament in early 1936, Zionist officials equipped MPs with arguments against the council’s establishment, and in view of the opposition in both houses, the government was compelled to revise its plans. When the Arab revolt erupted in April that year, *inter alia* because of the government retreat, the introduction of self-government was rendered inoperable altogether.

This, however, is only wisdom in hindsight, since for the contemporaries, the council’s establishment was perceived as a likely, if not certain, event. After Wauchope in 1932 reconfirmed his government’s intention to proceed with the Legislative Council plan, he estimated it would be established by 1934. While Wauchope was generally forthcoming on the development of the Jewish National Home, he was also quite unsusceptible to Zionist arguments against the council and proved intent on continuing with the project. His routine

answer to Zionist arguments was that a “pledge of honor” had been given in the Passfield White Paper and that pledges should be kept.

With the establishment of the Legislative Council just around the corner, new lines of argumentation were formulated. The Zionist leadership henceforth addressed Britain not only as the mandatory power in Palestine, underscoring its obligations toward the Zionist project and minimizing its obligations vis-à-vis the majority population of Palestine. It also addressed Britain as the head of an empire, whose experience in introducing self-government in its dependencies was utilized as an argument against the planned constitutional reforms.

An Imperial Epistemology

In the first half of the twentieth century, the British Empire underwent significant political and constitutional changes, amalgamated under a gradual transition to self-government. These changes were felt first in settler colonies such as Australia and Canada, which already had an elected government in the nineteenth century, obtained dominion status in 1907 – “a half-way house between colonial and independent status” – and were deemed “autonomous Communities within the British Empire” in 1926, followed in 1931 by the granting of full autonomy in virtually every aspect. In younger colonies, such as Southern Rhodesia, the predominately British settlers were granted self-government in 1923, subject to British control only in matters touching on “native affairs.” Self-government was also introduced, albeit in a more limited manner, in territories with few or no British settlers, which were hitherto considered too “socially primitive” and “economically valuable” to enjoy full representative government. Certainly, British Africa was still perceived as far removed from self-government, while in colonies such as Malta and Cyprus constitutional reforms were introduced only to be withdrawn later. Ceylon, however, “the pioneer of the non-European dependencies,” received universal suffrage in 1931 along with an almost entirely elected legislature and a partly local-based executive. In India, local authority was delegated to provincial leaders in a form known as “dyarchy,” resulting in a “subtle, but significant” erosion of British governance on the sub-continent, and in 1935 the autonomy of the provinces was further expanded. Self-government was extended to some of the Middle Eastern territories of the empire. Iraq received independence in 1932, while agreements from 1922 and 1936 secured a gradual British retreat from Egypt, a British protectorate whose Suez Canal was deemed crucial for securing the route to India.

Here is not the place to debate the motivations behind the introduction of limited self-government in Britain’s colonies and mandatory territories, which may have constituted a fulfilment of the empire’s moral mission in its colonies, translated into a political “trusteeship” until its inhabitants were ready for self-government; a symptom of its declining global power and early decolonization; or rather an attempt to meet national demands without conceding political influence and domination. What is essential to the matter at hand is that the question of self-government in Palestine was situated not only in the context of other mandates and their political progress, but also against an imperial backdrop, a world-spanning context experiencing similar processes at the same time. The imperial setting thus offered a framework for comparison and inspiration – and a foundation for political action.

Shortly after the plan for the Legislative Council was renewed in 1930, the Zionist Executive invited a young official in its ranks to author a short memorandum on the topic. Leo (Yehudah Pinhas) Kohn, born in Frankfurt am Main in 1894, started working for the Zionist Organization offices in London after World War I and later held various secretarial positions at the Hebrew University in Jerusalem. In between, he pursued his academic studies, receiving a PhD in Law from the University of Heidelberg in 1928, supervised by the Weimar Constitution expert, Richard Thoma. In the early 1930s, Kohn was adapting his dissertation into a book on the Constitution of the Irish Free State established in 1922, a book that remains to this day one of the most important studies on this topic. Kohn, who was already well versed in British constitutional affairs and had started making a name for himself as an expert on the Irish Constitution, was therefore the perfect candidate to broker imperial knowledge to Zionist officials. Following his involvement in the campaign against the Legislative Council, Kohn was offered the position of Political Secretary to the Jewish Agency in Jerusalem, which he would occupy from 1935 until 1948.

In his memorandum, Kohn carefully reviewed the council blueprint from 1922 – upon which the new council was supposed to be modeled – and suggested amendments which would safeguard Zionist interests. Therein, he drew extensively on the British imperial experience, especially in India. The 1919 constitutional reforms there had stipulated that in areas where Muslims constituted a minority, they would be represented beyond their demographics with a “weightage” of representatives. Kohn suggested modeling the Jewish representation in the council along the lines of the Indian precedent. He also encouraged the Jewish Agency to ask for a power of veto, which could be invoked if a bill directly affected a certain community and a supermajority of that community’s representatives opposed it. As Kohn pointed out: “If this is accepted by the British Government with regard to India, it should not be impossible to obtain their agreement to the insertion of a similar power of veto in the Palestine Constitution.”

As one might expect from someone with Kohn’s professional background, Ireland also appeared in his memorandum as a source of legal knowledge. For example, he proposed that members of the council take an oath modeled on the oath used in the Irish parliament, the Oireachtas. Unlike the oath to be taken by Palestine’s future parliamentarians that they would “be faithful and loyal to the

Government of Palestine,” the members of the Oireachtas swore allegiance not only to the king but also to the Constitution of the Irish Free State. Kohn asserted that if the Arab representatives were required to take a similar oath, this “would imply an acceptance not only of the Mandate, but also specifically of the Balfour Declaration,” which would be a substantial political achievement for the Zionist leadership. He added that conditioning the service of legislators on an acceptance of the Mandate might also have a moderating effect on the council’s actions, as “it might keep the Arab extremist out as affectively as for years it kept out the Irish republicans.” It might also have “split up” the Arab parties and made it possible to establish relations with “the less intransigent groups, as was the case in Ireland.” Kohn did not neglect to add that “the formula is one which the British Government may find it possible to accept” precisely because it had been used elsewhere. In other words, by invoking the

imperial experience through the case of the Irish oath, the Zionist leadership could have secured greater legitimacy for its attempts to safeguard the status of the Mandate after the establishment of the council.

Kohn was not the first to draw a connection between the constitutional experiments of the British Empire in its colonies and its plans for Palestine. In 1928, the Zionist Executive asked notable Zionists such as Yitzhak Ben-Zvi, Hugo Bergmann, Ze'ev Jabotinsky, and Arlosoroff for their opinions on the planned Legislative Council and the "Arab question." While the precedents of imperial legislative councils were not Arlosoroff's main focus, his memorandum reveals an extensive familiarity with the imperial constitutional experience, a familiarity which is not so surprising, perhaps, considering his engagement with the history of the British Empire in those years. For example, Arlosoroff suggested declaring certain topics beyond the scope of the council's authority while basing himself on the precedents of Malta and India. Similarly, he referred to imperial spheres such as the British West Indies, Ceylon, and Mauritius as an argument for creating of a very limited electorate in Palestine and keeping the population largely disenfranchised.⁷²

What both Kohn and Arlosoroff's memoranda have in common is the twofold function of the imperial experience. First, this experience functioned as a catalogue of constitutional practices introduced under British colonial rule, from which the Jewish Agency could draw inspiration in devising its suggestions for the council in Palestine. Second, the imperial experience functioned as a legitimacy litmus paper: If these forms had been adopted in other parts of the British Empire, it made a Zionist demand for similar solutions for Palestine all the more reasonable. Later, the imperial experience would have a third function: It would become the backbone of the case against the Legislative Council.

An Imperial Argument

In March 1933, Kohn was invited to prepare a new study on the topic. This lengthy study – over 150 pages – took him almost two years to complete and featured lessons to be drawn from Ceylon, Kenya, the West Indies, Cyprus, Iraq, Transjordan, Syria, and Lebanon – contexts he deemed analogous to Palestine insofar as all of them featured either "an advanced European minority find[ing] itself in the midst of a rather backward native population" or a heterogeneous society being governed by Britain. In addition to reviewing the mechanisms of other legislative councils established in the British Empire, which could help render the one in Palestine "as innocuous as possible from the Jewish point of view," the survey's declared purpose was to formulate arguments against its establishment. Indeed, the survey formed the backbone of another, shorter memorandum Kohn authored, which the Jewish Agency submitted to the Colonial Office in October 1934.

Unlike the previous memorandum of 1930, the new memorandum's audience was not the Zionist leadership but the Colonial Office. The imperial experience now came to play a role in the discussion on Palestine's Legislative Council not only as a valuable comparative aid, illustrating what other types of representation were available and which Britain would be

willing to introduce. Now, it was an argument that could be used to dissuade the mandatory power from establishing the council in Palestine altogether. By drawing on the imperial constitutional experience and targeting imperial sensibilities, Kohn attempted to convince the Colonial Office to forego the plan – but not because it contradicted the Mandate, but because it had proven unworkable, or even destructive, in other parts of the empire.

A key example is Kohn's reference to the functioning of Ceylon's legislature, which he portrayed as an ominous sign for Palestine's future Legislative Council. According to the report of the Special Commission on the Ceylon Constitution of 1928, also known as the Donoughmore Commission, Ceylon's legislature was characterized by "the divorce of power from responsibility": a legislature with a popularly elected majority, but without any executive powers, which remained with the British government. The result was an executive independent from the legislature's confidence and a legislature barred from formulating constructive policy. Therefore, the legislature was more occupied with obstructing the government and putting forward unrealistic demands than cooperating with it, afraid that any cooperation with a colonial government would risk its nationalist credentials. The government, for its part, preferred to succumb to the unofficial members' demands rather than bring the system to an impasse. The unofficial members thus learned that "the administrative machine [was] completely at their mercy" and that the government's potential for action was severely limited.

The commission recommended placing both legislative and executive power in the hands of a council with a popularly elected majority. Kohn, whose mission was to decrease the council's authorities, not to increase them, rejected the commission's conclusions but embraced its criticism and drew a direct parallel between Ceylon and Palestine. It should have been "obvious for anyone familiar with the present temper of the Arab leaders" that the council would not achieve a *modus vivendi* between Palestine's different groups. Instead, it would become "a sounding-board [...] of an aggressive Arab nationalism" and the Arab representatives, like the Ceylonese, would do everything in their power to obstruct the administration of the country. Citing the report of the Commission on Closer Union of Eastern and Central Africa, Kohn argued that the establishment of a Legislative Council would not be an exercise in responsibility but rather "an education in the art of embarrassing those who are responsible." He warned: "[T]he concession of any measure of representative government inevitably acts as a spur to the demand for complete selfgovernment." Therefore, the establishment of a Legislative Council was not a limited exercise in self-government, but the beginning of a slippery slope through which the local majority would gradually extort greater measures of self-government.

In a similar fashion, Kohn drew on the imperial experience to argue that no safeguards could prevent the damage inflicted on the Jewish National Home by a council dominated by an Arab majority. One of these safeguards, suggested by Britain, was to prohibit the council from discussing matters addressed in the Mandate, such as immigration and land purchase, hoping thereby to alleviate Zionist fears. Kohn argued, however, that this plan was moot: "native policy is so intimately bound up with every department of government, [sic] that any clear-cut separation of subjects is impossible," as he cited the official report on the Legislative Council

of Kenya. No safeguards, “however ingeniously devised,” could protect Zionist interests in Palestine the moment the council took shape, he warned.

Kohn used other opportunities besides the memorandum to communicate to British officials the malfunctioning of the future legislature, such as his meeting in January 1934 with Eric Mills, the Assistant Chief Secretary of Palestine’s Government. The experiment of Iraq, Kohn told Mills, had manifested quite well what it meant to introduce local government in Arab territories of the British Empire, a group to which Palestine also essentially belonged. Recounting what he had heard about the corrupt ways of the new Iraqi Government, Kohn argued that it was “obvious that representation meant something entirely different in England from what it connoted in Baghdad.” Kohn claimed that the British elected members “genuinely represented the political and economic aspiration” of their constituencies, whereas in Baghdad “the political leaders felt no real responsibility to the electors.” Mills disagreed with this view, and so Kohn deduced that Mills “did not regard conditions in Palestine as unfavorable to the introduction in some measure of self-government, for though all the time we talked about Iraq and Syria, it was perfectly clear to both of us that we were describing

Palestine.”

Kohn’s deep familiarity with the political situation in Ireland served a similar purpose in his meeting with Mills: “The Irish experiment had shown once again [...] that the British representative system was not an international export article.” The British constitution “worked well as long as its basic frame work [sic] was accepted by all parties in the State, as long as majorities did not unduly exploit their power and as long as representatives felt a real sense of responsibility to their electors,” he argued. When political representatives were ridden with corruption, estranged from their voters, and rejected the basic constitutional framework – he was here alluding to the Arabs’ rejection of the Mandate – they should be excluded from the country’s legislature, Kohn hinted.

The future electorate in Palestine was another subject of criticism. The High Commissioner should be reminded, suggested Kohn on another opportunity, that “[t]hroughout the Colonial Empire far-reaching limitations have been introduced in regard to the admission of populations of lower cultural and social standards to the franchise – literacy; [sic] civilisation and property tests.” In the Bahamas, only thirteen percent of the population were enfranchised; in Jamaica, less than seven percent were allowed to vote; in other West Indies colonies, merely one percent enjoyed enfranchisement. There was no reason why such limitations should not be introduced in Palestine as well, he stressed: “Why should [...] the vote of the semi-Beduin [sic] who is an easy prey to [sic] fanatical agitation; [sic] count for as much as that of the West-European Jew? If not Jews; [sic] but English colonists were concerned would it not have been a matter of course to introduce such limitations?”

Sui Generis

While the imperial experience was Kohn’s main point of departure, he simultaneously also stressed Palestine’s uniqueness. “The terms of the Mandate invest it with a legal character sui generis,” he declared. Unlike other mandates, the Mandate of Palestine imposed on Britain

the obligation to govern not only in the interests of those who lived in the country but also of those not yet to be found there. Kohn added that Palestine's unique status, as evident from multiple provisions in the Mandate, was also clearly demonstrated in the difference between its Mandate and other Class-A Mandates. Whereas the draft Mandate of Mesopotamia and that of Syria and Lebanon explicitly prescribed the introduction of an Organic Law, i.e., a constitution, Palestine's Mandate spoke only of self-governing institutions. Consequently, Kohn concluded that "the authors of the Mandate were fully alive to the exceptional circumstances governing the administration of Palestine."

In fact, the overall impression given in the final memorandum was not Palestine's similarities with other colonies, but the country's unique history, characteristics, and status among British colonial possessions. Moreover, when comparing Kohn's earlier drafts of the memorandum with the final version submitted to the Colonial Office, one cannot help but notice that the direct reference to the imperial experience had been softened. The criticism Kohn received from other Zionist officials was perhaps responsible for these revisions: Leonard Stein, a lawyer and consultant to the Jewish Agency, thought that "we ought not [...] to seem to be explaining the complexity of Colonial administration to the Colonial Office, as though we had something to teach them. A reminder of certain familiar difficulties would I think, make a better impression."⁹¹ Stein also thought that they should "concentrate on a concise explanation of the Jewish objections in relation to the special circumstances of this particular case."⁹²

The comparability of Palestine to other spheres of the British Empire preoccupied Machover and Laserson as well, who each took opposing sides on this question. Machover argued that the constitutional problems of Palestine were "not so unique as they may appear on the surface. There are a number of precedents in the Constitutional development of the British Colonies which, *mutatis mutandis*, may throw light on the Constitutional situation in Palestine." This is because the position of the British Government in Palestine, "the protector of the Jewish settlers in that country," was "in many respects similar to that which has faced British settlers in various overseas colonies."

Laserson, on the other hand, emphasized the unique position of Palestine within the framework of the British Empire. "It is without a doubt that the constitutional experience of the British Commonwealth of Nations is very extensive," he admitted. "Nonetheless, one can say for certain that in this whole gigantic governmental-legal structure there is not one precedential type that can be used as the foundation for the constitutional structure of Eretz Israel." This view, however, did not prevent him from turning to the constitutional experience of the British Empire in his argumentation against the Legislative Council.

Unlike the above, Kohn emphasized Palestine's uniqueness and its similarity to other contexts at the same time. His discussion of parity, which appeared in earlier drafts but was eventually left out of the memorandum submitted to the Colonial Office, may best illustrate how he grappled with the tension between the two. Kohn maintained that the only solution which could truly safeguard the Jews' position in Palestine was parity, i.e. that the seats be equally divided between Arabs and Jews, despite the current demographical imbalance. Originally promoted by the dissenting Brit Shalom group, parity found its way into mainstream Zionist discourse in

the early 1930s, mainly upheld by Weizmann and Ben-Gurion. It was bound up in the famous principle of “mutual non-domination”: the idea that neither group in Palestine should exercise control over the other.

In 1930, Kohn admitted that parity was, “of course, contrary to ordinary democratic standards,” such as proportional representation. However, the peculiar character of the Mandate justified a diversion from what he termed the “crude application of [the] majoritarian principle.” According to Kohn, the Mandate incorporated a twofold obligation to both the Arabs and the Jews – a *sui generis* obligation that was missing from other mandates – and so it only made sense to implement this duality in a bipartite legislature. Therefore, in his first memorandum, Palestine’s *sui generis* status was the fundamental justification for parity.

In his later memorandum, however, it was not only Palestine’s *sui generis* status that was employed as a justification for parity, but also the exact opposite: the imperial framework to which Palestine belonged, which could tolerate such an exception to proportional representation. “The conception of parity is really not so unprecedented as it may at first sight appear,” Kohn pointed out: “[I]t is an old-established notion in British constitutional history, both at home and in the colonies, that the granting of representation to any group should be based not merely – not even primarily – on its numerical strength, but on its actual influence, on the place it holds in the general life of the community, its significance in the present and its potentialities for the future.”

Kohn argued that this tradition assumed particular relevance and importance when devising a political solution for heterogeneous societies. In countries divided across racial and religious lines, he argued, legislation made by a majority vote “would mean that one community could impose its will on the other,” citing the Hilton Young report which addressed the political representation of European settlers, Indian and Arab communities, and the native majority population in East Africa. But luckily, Kohn argued, constitutional practice in the British Empire, especially in India, provided an instructive model for tackling this problem. “The conception of parity, as proposed for Palestine, is, it is submitted, but the logical development of the ideas underlying the weightage schemes,” Kohn concluded.

In 1932, the Colonial Secretary described the suggestion of parity as “unreasonable and impossible.” Yet the “history of the adaptation and application of British constitutional forms to the requirements of colonial government,” Kohn countered, “abounds in devices which, on ground of logic and commonsense [sic], can only be described as ‘unreasonable and impossible.’” These devices “clearly defy the habitual British conceptions of representative institutions.” In fact, “if there is any general principle at all underlying the complex structure of the British Empire, it is that no hard and fast model of representative government can be dogmatically applied in all circumstances and conditions.” Consequently, the introduction of parity was more than reasonable – not just because of Palestine’s *sui generis* status, but rather because the imperial experience rendered it digestible. In other words, the political elasticity of the empire enabled Kohn to argue that while proportional representation was certainly positive, it was by no means the only available logic to guide the colonial political structure, especially in contexts governed by unique settings and circumstances.

The solution of parity as reflecting both Palestine's uniqueness and imperial political traditions was also alluded to by Arlosoroff. In a conversation with Wauchope in March 1932, he thought that parity suited "the peculiar conditions of Palestine," as the status of the Jewish minority there was remarkably different from that of other minorities in the world. In the same breath, however, he compared parity to the constitutional solution devised in Canada a century earlier, where "there had also been a constitutional scheme on a parity basis between French Catholic Quebec and English Protestant Ontario." Similarly, he deemed parity legitimate precisely because "in the Administration of various British Crown Colonies and dependencies [...] this 'regular' conception of representation has been thrown overboard in order to meet the specific requirements of each individual case."¹⁰⁹ Like Kohn, Arlosoroff thus considered parity an appropriate solution because it reflected Palestine's uniqueness and the British imperial experience.

In fact, it seems that it was precisely the elasticity of constitutional structures in the British Empire that reconciled the incongruity between these two lines of argumentation in Zionist thought, the one stressing Palestine's similarity to other colonial contexts, the other its *sui generis* characteristics. If the solutions offered in the empire were tailored to each realm's particular problems, Palestine's relationship to the empire was what allowed for deviations from common democratic standards, such as proportional representation. Stressing Palestine's unique setting and drawing imperial connections could thus go hand in hand.

This was not the only case in which Kohn was preoccupied with the question of constitutional flexibility in the British Empire, as he also debated similar questions in his 1932 book on the Irish Free State constitution. This new political entity, established in 1922, had been given dominion status, like Australia, New Zealand, South Africa, Newfoundland and Canada. While remaining conscious of the links that tied the Irish state to the British system, Kohn argued that not only was the dominion status constitutionally elastic, but also that the Irish Free State was only nominally a dominion and was markedly different from other dominions of the British Empire: "In the garb of 'dominion status' a nationally self-conscious European State was introduced into the symmetry of the Empire, a Dominion neither in form nor in substance." In other words, the legal relationship of the Irish Free State to the British Empire was hardly deterministic in Kohn's opinion, and had rather been adjusted to the existing circumstances.

From a legal perspective, this argument was by no means obvious and constituted the most politicized and contestable part of the book. Thomas Mohr argued that Kohn had probably been influenced here by the ideas of his close contacts in the Irish government, who sought to minimize the Irish Free State's constitutional inferiority vis-à-vis Britain. It is clear, then, that Kohn was particularly sensitive to what belonging to the British Empire meant, how flexible this belonging might be, and how this ambiguity could be harnessed for political and national purposes.

Other Zionist writers, such as Machover, marshaled the British imperial experience against the proposed Legislative Council because of the specific constitutional instruments it offered. For example, he expected the solutions suggested for political representation in Kenya – namely, to assign the seats according to the communities' diverging "political capacity and importance"

– to be applied in a similar manner to other territories of “mixed races” such as Palestine. “It would surely be intolerable and unthinkable that Britain should apply one policy in Jerusalem and the reverse everywhere else!” he argued. In other words, Machover perceived the British Empire as a unitary political organ whose inner patterns and codes were innately consistent.

Kohn and Arlosoroff, on the other hand, understood the British Empire as a system capable of great flexibility, which could benefit Zionist interests in Palestine. In 1929, Arlosoroff had reminded the Zionist Executive that it would be possible to devise a Legislative Council that was less compromising for Jews’ status in Palestine precisely because of the structural flexibility of the British Empire. When introducing self-government in their dependencies, the British government had been willing to consider the specific situation at hand, each with its unique religious or ethnic dynamics, and to adjust its plans accordingly, he explained. “The result has been [sic] a startling variety of constitutional systems and schemes” in which “a multiplicity of individual local problems was met by a multiplicity of legal provisions and institutions.” It was thus the flexibility of the British imperial system, rather than its uniformity, which created an opportunity for Zionism.

As the British historian Martin Wight wrote in 1945, “the most obvious feature of British colonial government is its diversity.” Similarly, the constitutional expert Ivor Jennings argued in 1956 that “there [was] a constant process of experimentation” in the empire, where “[t]he experience of one territory [was] used in another: but it [was] not assumed that the two territories ought to develop similar institutions.” Flexibility was considered by constitutional scholars such as Albert Venn Dicey as one of the main features of British constitutional law, being specifically bound up with governing the empire. According to Dicey, this flexibility enabled the imperial government to adjust forms of rule according to the perceived ‘level of civilization’ of the population, and thereby contribute to imperial unity.

In fact, the elasticity of political structures and the flexibility in which interimperial relations were molded was precisely what British officials flaunted. “That is England’s way: it does not ascribe importance to general theories, but allows the institutions to develop in practice, always according to the needs of the hour and place,” as Norman Bentwich, the British Jewish Attorney General of the Palestine Government, contended in 1927. “Our system, or lack of system, has certain great advantages,” argued Leo Amery, the Secretary of State for the Colonies, in a speech at the Colonial Office Conference that same year:

Each Colonial Government and each Colonial Service has grown up on the spot by a continual process of local evolution from the days of our first historical connection with the Colony, the days of the first treaty cession, the first conquest, the original peaceful trading penetration, as the case may be. Each Government and each Service, therefore, is autochthonous, racy of the soil, adapted to local conditions and instinctive in its understanding of those conditions and in its sympathy with the population it administers.

“We do not require wooden uniformity,” said William Ormsby-Gore, the UnderSecretary of State for the Colonies, in 1926 during a visit to West Africa, “because the British Empire is conceived as a great unity built on a great diversity”. The advantages of this political

flexibility, which served first and foremost the needs of British administrators, were clearly also apparent to Zionists such as Kohn and Arlosoroff.

I suggest that the elasticity of political representation and constitutional flexibility in the empire went hand in hand with what Dubnov identified as the fluidity and ambiguity of political concepts in interwar imperial statist thought.¹²³ This ambiguity served not only colonial officials, but also national leaders in the empire. As John Darwin maintains, it was the “plasticity” of the dominion model that made it especially appealing for Irish and South African leaders: “It enabled them to tread the finest of lines between public deference to imperial unity – expressed primarily through allegiance to the common monarchy – and the rhetorical assertion of national independence.”

Similarly, key Zionist leaders, such as Arlosoroff and Jabotinsky, found the fluidity of political concepts prevalent in the interwar period – selfgovernment, dominion, commonwealth – compelling. This was not only because these men were not necessarily tied to any infatuation with the nationstate paradigm, but also because it was a formula of relationship to the British Empire that could be conducive to Zionist goals. For them, belonging to the British Empire was an opportunity, rather than an obstacle, for the Jewish National Home. As Kohn’s and Arlosoroff’s work reveals, British constitutional law, with its innate flexibility as revealed throughout the empire, created the platform through which this opportunity could take shape.

Conclusion

“Except for a certain amount of rhetorical exaggeration, this memorandum appears to me to put the Jewish case against the establishment of a legislative [council] as well as it can be put,” noted the Colonial Office Principal Harold Downie upon receiving Kohn’s memorandum in October 1934. He also commented briefly on the references in the memorandum to the imperial constitutional experience. While it did so “in rather exaggerated terms [:::], the difficulties to which the Agency draw[s] attention” in the context of safeguards of the representation of minorities “are no doubt very real ones,” Downie admitted, “and their references to the observations of the East African Closer Union Commission as regards the difficulty of reservation of subjects are much to the point.” These apprehensions were “shared to some extent by everyone here and in Palestine who has recently considered the subject,” he added.

Kohn’s memorandum thus achieved its humble purpose, as articulated by Stein: to “remind” British officials of “certain familiar difficulties.” But for the historian, the significance of Kohn’s work is not summed up solely by its success in evoking the intended British response by targeting imperial sensibilities. First, Kohn’s work allows for a window into the Zionist horizon of expectations, which was conditioned by Palestine’s relationship to the British Empire at the time. As recent studies have shown, the uncertain, contingent political climate post-World War I was ripe with possibilities for the Zionist movement, especially now that Britain was made the Mandatory power in Palestine. In the late 1920s, in particular, Zionist leaders such as Arlosoroff and Jabotinsky toyed with the idea of deepening Palestine’s relationship to the British Empire. However, as the rhetoric in political writings of leaders does

not always allow for intentions to be discerned, it is the work of the technocrats, lawyers, junior officials, and people of the second and third ranks, such as Kohn, that reveal the concrete shapes that the Zionist horizon of expectation took. In this case, it was a willingness to explore the relevance – as a reference, a litmus paper, or an argument – of the imperial constitutional experience for Palestine’s future legislature.

Second, and interrelated to the first point, Kohn’s and Arlosoroff’s work provides a glimpse into the political field that British constitutional law had created for colonial subjects. In their resolution of what seemed like a contradiction within Palestine’s position in the British Empire, as a territory that was unique and at the same time similar or at least comparable to others, Kohn and Arlosoroff made cognizant use of what they saw as one of the fundamental characteristics of British constitutional law: its inherent flexibility. This flexibility was perceived by British officials and scholars as an asset, also because it allowed Britain to tailor constitutional reforms according to a colony’s “level of civilization.” As demonstrated in this article, Zionists such as Kohn and Arlosoroff were also highly conscious of the advantages promised by this flexibility, albeit for different reasons. For them, British constitutional law provided a bulwark against the “crude application” of principles that were becoming increasingly popular in interwar discourse, such as a wide franchise and proportional representation. Whether Zionists mobilized British constitutional law in the same way as did other national movements is yet to be explored. However, the Zionist campaign against the Legislative Council reveals that, in a vein not unlike the South African and Irish engagement with the model of the dominion, it was specifically the flexibility of British constitutional law with which national movements, navigating their future within the empire, grappled.

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